

**AMENDMENT TO THE DRAWINGS:**

The attached sheet of drawings includes a change to the lead line for reference number 24 in Figure 2. Applicant has submitted the corrected drawing sheet in compliance with 37 C.F.R. 1.121(d), as recommended by the Examiner. Accordingly, Applicant respectfully requests that the objection to the drawings be withdrawn.

## **REMARKS**

### ***STATUS OF THE CLAIMS***

Claims 1-25, 27, and 29-49 are pending in this application. Claims 3, 22, and 23 have been withdrawn from consideration as being purportedly drawn to a non-elected species. By this amendment, claims 26 and 28 have been canceled and new claims 47-49 have been added. Claims 1, 29, 31, and 40 are independent.

As an initial matter, Applicant wishes to thank the Examiner for the indication of allowable subject matter in claims 28 and 29. As explained below, Applicant has amended claims 1 and 31 to include the subject matter of allowable claim 28. In addition, Applicant has placed allowable claim 29 in independent form. Thus, independent claims 1, 29, and 31 are allowable.

In the Office Action, claims 1, 2, 4-21, 24-27, and 30-46 were rejected under 35 U.S.C. § 103(a) based on Visser et al. (U.S. patent No. 6,464,418; hereafter "Visser") in combination with Kellett (U.S. Patent No. 4,806,572; hereafter "Kellett").

### ***ELECTION***

Applicant acknowledges the additional withdrawal of claims 3 and 23 from consideration as being purportedly drawn to a non-elected species. Applicant respectfully requests that withdrawn claims 3, 22, and 23 be rejoined and examined upon a determination of an allowable, generic claim.

### ***THE REJECTION OF CLAIMS 1, 2, 4-21, 24-27, AND 30-46 SHOULD BE WITHDRAWN***

Although Applicant does not agree with the section 103(a) rejection of independent claims 1 and 31, Applicant has obviated the rejection of these claims by

amending each of independent claims 1 and 31 to recite the allowable subject matter of claims 28. Therefore, Applicant respectfully submits that the section 103(a) rejection of independent claims 1 and 31 should be withdrawn.

Regarding independent claim 40, the Office Action does not appear to address claim 40 directly, but does refer to other claims. Applicant respectfully submits that no prima facie case of obviousness has been established with respect to claim 40 because no combination of the applied references teaches all of the claim recitations of claim 40, nor is there any motivation to combine the references in the manner suggested in the Office Action.

Neither Visser, Kellett, nor any combination thereof provides any disclosure or suggestion of “[a] device for applying a cosmetic product” comprising, among other things, “an applicator comprising a porous structure . . . wherein the porous structure comprises at least one biocidal agent comprising a composition comprising at least one quaternary ammonium compound, at least one phenolic compound, and at least one nitrogen-based heterocyclic compound,” as recited in claim 40. The Office Action acknowledges that “the Visser reference does not disclose that the applicator includes a biocidal agent thereon.” Office Action at 4. The Office Action relies on Kellett for an alleged teaching of a “porous applicator for applying makeup remover wherein a biocidal agent is present on the applicator in order to eliminate the bioburden on the pad (see column 7, lines 19-33).” Id. The Office Action acknowledges, though, that “the Kellett reference does not disclose the specifically claimed characteristics of the biocidal agent.” Id. The Office Action asserts, without any support, that “any suitable biocidal

agent, including an agent having the claimed features, can be employed without effecting the overall operation of the device . . .” Id.

Contrary to the assertions in the Office Action, however, there is no disclosure or suggestion of a device that includes an application including a porous structure that comprises “at least one biocidal agent comprising at least one quarternary ammonium compound, at least one phenolic compound, and at least one nitrogen-based heterocyclic compound,” as recited in claim 40. Moreover, the devices of Visser and Kellett are significantly different in structure due to divergent intended uses (as will be discussed in greater detail below), and as such, no ordinarily skilled artisan would have found the Office Action’s broad reaching and unsupported assertion of obviousness to be valid. Therefore, neither the applied references nor any other source discloses or suggests each and every recitation of claim 40. Accordingly, at least one essential criteria for establishing a prima facie case of obviousness is lacking and, for at least these reasons the section 103(a) rejection of claim 40 should be withdrawn.

In addition, there is no motivation to combine the references in the manner suggested. The Office Action reaches the unsupported conclusion that “it would have been obvious . . . to include such a biocidal agent onto the applicator in the Visser device in order to eliminate the bioburden on the pad.” However, there is no suggestion, motivation, or teaching in the applied references or any other source to combine the biocidal agent of Kellett with the applicator of Visser, as suggested in the Office Action. Visser discloses an applicator 22 including a sponge 24, which may be stored and/or dipped in a storage chamber 14, which contains a liquid eye makeup remover R. Col. 3, lines 32-33 and 48-67. In contrast, Kellett teaches a premoistened

makeup remover pad, wherein “the addition of water to the present pads would be deleterious . . .” Col. 1, lines 30-35 and 12-22. Therefore, while Visser teaches an applicator pad to which makeup remover is to be applied and reapplied by dipping into the storage chamber, the applicator of Kellett is “premoistened” and ready for use as purchased by a consumer. Kellett discloses particular details regarding the porosity of the foam and the manufacturing processes by which it is made that provide the applicator with the desired content and properties (e.g., “a high degree of slip”; col. 2, line 3). Col. 1, lines 58-col. 2, line 34. Visser discloses no such structure or methods of manufacture to render the sponge 24 premoistened and ready for use such that additional wetting or impregnation with agents would be deleterious.

Further, as discussed in Applicant’s specification in paragraph [051], preventing an applicator from completely drying out may reduce the likelihood of bacteria and germs growing on the porous structure of the applicator. Because Visser discloses a device wherein the sponge 24 is stored in the liquid makeup composition R between uses, the likelihood of bacterial growth on the applicator of Visser is reduced, and thus, one of ordinary skill in the art would not have been motivated to include the biocidal agent of Kellett on the device of Visser.

Because the structure and intended uses of the devices of Visser and Kellett are recognizably divergent and because the device of Visser is configured to maintain the sponge 24 in the liquid makeup composition R thereby reducing the likelihood of bacterial growth, one of ordinary skill in the art would not have found any motivation, suggestion, or teaching to include the alleged teachings of Kellett (e.g., a biocidal agent) on the applicator of Visser. Therefore, at least one essential criteria for establishing a

prima facie case of obviousness is lacking and, for at least this reason the section 103(a) rejection of claim 40 should be withdrawn.

New claims 47-49 have been added to include claims directed to features of exemplary embodiments. The subject matter of claim 49 is supported in the specification at paragraph [029].

In view of the foregoing amendments and remarks, each of independent claims 1, 29, 31, and 40 is allowable. Claims 2-25, 27, 30, 32-39, and 41-49 each depend from one of independent claims 1, 29, 31, and 40, and thus, are allowable for at least the same reasons as the respective claims from which they depend.

## **CONCLUSION**

Applicant respectfully requests reconsideration of this application, the withdrawal of the section 103(a) rejection and the objection to the drawings, rejoinder and examination of the withdrawn claims, and the timely allowance of the pending claims.

The Office Action contains numerous characterizations of the claims and the related art, with which Applicant does not necessarily agree. Unless expressly noted otherwise, Applicant declines to subscribe to any statement or characterization in the Office Action.

Please grant any extensions of time required to enter this response and charge any additional required fees to our deposit account 06-0916.

Respectfully submitted,

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Attachments: 1 Replacement Drawing Sheet, Figs. 2 and 5.